

the Acting Director of the Virginia Department of the Environmental Quality on April 14, 1998.

**§ 52.2450 [Amended]**

3. Section 52.2450 is amended by removing and reserving paragraph (e).

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 132**

[FRL-6881-9]

**Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of New York, and Final Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA published the final Water Quality Guidance for the Great Lakes System (the Guidance) on March 23, 1995. Section 118(c) of the Clean Water Act (CWA) requires the Great Lakes States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin to adopt within two years of publication of the final Guidance (*i.e.*, March 23, 1997) minimum water quality standards, antidegradation policies and implementation procedures that are consistent with the Guidance, and to submit them to EPA for review and approval. Each of the Great Lakes States made those submissions.

Today, EPA is taking final action on the Guidance submission of the State of New York. EPA's final action consists of approving those elements of the State's submission that are consistent with the Guidance, disapproving those elements that are not consistent with the Guidance, and specifying in a final rule the elements of the Guidance that apply in the portion of New York State within the Great Lakes System where the State either failed to adopt required elements or adopted elements that are inconsistent with the Guidance.

**EFFECTIVE DATE:** November 6, 2000.

**ADDRESSES:** The public docket for EPA's final actions with respect to the Guidance submission of the State of New York is available for inspection and copying at U.S. EPA Region 2, 290 Broadway, New York, N.Y. 10007 by appointment only. Appointments may be made by calling Wayne Jackson (telephone 212-637-3807).

**FOR FURTHER INFORMATION CONTACT:** Mark Morris (4301), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460 (202-260-0312); or Wayne Jackson, U.S. EPA Region 2, 290 Broadway, New York, N.Y. 10007 (212-637-3807).

**SUPPLEMENTARY INFORMATION:**

**I. Discussion**

*A. Potentially Affected Entities*

Entities potentially affected by today's action are those discharging pollutants to waters of the United States in the Great Lakes System in the State of New York. Potentially affected categories and entities include:

Category	Examples of Potentially Affected Entities
Industry .....	Industries discharging to waters within the Great Lakes System as defined in 40 CFR 132.2 in New York State.
Municipalities	Publicly-owned treatment works discharging to waters within the Great Lakes System as defined in 40 CFR 132.2. in New York State.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding regulated entities likely to be affected by these final actions. This table lists the types of regulated entities that EPA believes could be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility may be affected by this final action, you should examine the definition of "Great Lakes System" in 40 CFR 132.2 and examine 40 CFR 132.2 which describes the part 132 regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. Background*

On March 23, 1995, EPA published the Guidance. See 60 FR 15366; 40 CFR part 132. The Guidance establishes minimum water quality standards, antidegradation policies, and implementation procedures for the waters of the Great Lakes System in the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. Specifically, the Guidance specifies numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and provides methodologies to derive numeric criteria for additional

pollutants discharged to these waters. The Guidance also contains minimum implementation procedures and an antidegradation policy.

Soon after being published, the Guidance was challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1997, the Court issued a decision upholding virtually all of the provisions contained in the 1995 Guidance. *American Iron and Steel Institute, et al. v. EPA (AISI)*, 115 F.3d 979 (D.C. Cir. 1997). The Court vacated the human health criterion for polychlorinated biphenyls (PCBs) and the acute aquatic life criterion for selenium, and the provisions of the Guidance "insofar as it would eliminate mixing zones for (bioaccumulative chemicals of concern (BCCs)) and impose (water quality-based effluent limitations (WQBELs)) upon internal facility waste streams." 115 F.3d at 985. On October 9, 1997, EPA published a document revoking the PCB human health criteria pursuant to the Court's decision. 62 FR 52922. On April 23, 1998, EPA published a second notice amending the 1995 Guidance to remove the BCC mixing zone provisions from 40 CFR part 132 (found in procedure 3.C. of appendix F) and to remove language in the Pollutant Minimization Program provisions (procedure 8.D. of appendix F) that might imply that permitting authorities are required to impose WQBELs on internal waste streams or to specify control measures to meet WQBELs. 63 FR 20107. On June 2, 2000, EPA published a third document withdrawing the acute criteria for selenium. 65 FR 35283.

40 CFR 132.4 requires the Great Lakes States to adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System consistent with the Guidance or be subject to EPA promulgation. 40 CFR 132.5(d) provides that, where a State makes no submission to EPA, the Guidance shall apply to discharges to waters in that State upon EPA's publication of a final rule indicating the effective date of the part 132 requirements in that jurisdiction.

On July 1, 1997, the National Wildlife Federation filed suit alleging that EPA had a non-discretionary duty to promulgate the Guidance for any State that failed to adopt standards, policies and procedures consistent with the Guidance. *National Wildlife Federation v. Browner*, Civ. No. 97-1504-HHK (D.D.C.). EPA negotiated a consent decree providing that the EPA Administrator must sign, by February 27, 1998, a **Federal Register** document making part 132 effective in any State in

the Great Lakes Basin that failed to make a submission to EPA by that date under 40 CFR part 132. However, all of the Great Lakes States made complete submissions to EPA on or before the February deadline. On March 2, April 14, April 20 and April 28, 1998, EPA published in the **Federal Register** documents of its receipt of each of the States' Great Lakes Guidance submissions and a solicitation of public comment on the National Pollutant Discharge Elimination System (NPDES) portions of those submissions. 63 FR 10221; 63 FR 18195; 63 FR 19490; 63 FR 23285.

40 CFR 132.5(f) provides that, once EPA completes its review of a State's submission, it must either publish notice of approval of the State's submission in the **Federal Register** or issue a letter notifying the State that EPA has determined that all or part of its submission is inconsistent with the CWA or the Guidance, and identify any changes needed to obtain EPA approval. If EPA issues a letter to the State making findings of inconsistencies, the State then has 90 days to make the necessary changes. If the State fails to make the necessary changes, EPA must publish a document in the **Federal Register** identifying the approved and disapproved elements of the submission and a final rule identifying the provisions of the Guidance that will apply to discharges within the State.

On November 15, 1999, the National Wildlife Federation and the Lake Michigan Federation filed suit alleging that EPA had a non-discretionary duty to take action on the Great Lakes States' Guidance submissions. *National Wildlife Federation v. Browner*, Civ. No. 99-3025-HHK (D.D.C.). EPA negotiated a consent decree providing that EPA must sign a **Federal Register** Notice by July 31, 2000, taking the action required by 40 CFR 132.5 on the Guidance submissions of the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Pennsylvania; and **Federal Register** Notices by September 29, and October 31, 2000, taking the action required by 40 CFR 132.5 on the Guidance submissions of the States of New York and Wisconsin, respectively. Today's **Federal Register** Notice fulfills EPA's obligations under that Consent Decree with respect to the State of New York. EPA has completed its final actions with respect to the States of Michigan, Ohio, Indiana, Illinois, Minnesota, and Pennsylvania, and will separately take final action with respect to Wisconsin. EPA notes that the States' Guidance submissions may contain provisions that revise its NPDES program or water quality standards in areas or with

respect to regulated entities not covered by the Guidance. EPA is not taking action at this time to either approve or disapprove any such provisions.

EPA has conducted its review of the State of New York's submission in accordance with the requirements of section 118(c)(2) of the CWA and 40 CFR part 132. Section 118 requires that States adopt policies, standards and procedures that are "consistent with" the Guidance. EPA has interpreted the statutory term "consistent with" to mean "as protective as" the corresponding requirements of the Guidance. Thus, the Guidance gives States the flexibility to adopt requirements that are not the same as the Guidance, provided that the State's provisions afford at least as stringent a level of environmental protection as that provided by the corresponding provision of the Guidance. In making its evaluation, EPA has considered the language of each State's standards, policies and procedures, as well as any additional information provided by the State clarifying how it interprets or will implement its provisions.

Where EPA has promulgated a final rule that identifies a provision of the Guidance that shall apply in New York, EPA explains below its reasons for concluding that New York failed to adopt requirements that are consistent with the Guidance. Additional explanation of EPA's conclusions are contained in EPA's correspondence with New York State (identified in relevant sections below) where EPA initially identified inconsistencies in the State's submission. Notice of the availability of this letter was published in the **Federal Register** and EPA has considered all public comments received regarding any conclusions as to whether New York State had adopted provisions consistent with the Guidance.

In this proceeding, EPA has reviewed the State's submission to determine its consistency with 40 CFR part 132. EPA has not reopened part 132 in any respect, and today's action does not affect, alter or amend in any way the substantive provisions of part 132. To the extent any members of the public commented during this proceeding that any provision of part 132 is unjustified as a matter of law, science or policy, those comments are outside the scope of this proceeding.

With regard to those elements of the State submission being approved by EPA, EPA is approving those provisions as amendments to New York State's NPDES permitting program under section 402 of the CWA and as revisions to New York State's water quality

standards under section 303 of the CWA. Today's notice identifies those approved elements. Additional explanations of EPA's review of and conclusions regarding New York State's submission, including the specific State provisions that EPA is approving, are contained in the administrative record for today's actions in documents prepared for New York State entitled, "New York State Provisions Being Approved as Being Consistent With the Guidance," "Analysis of Whether New York State Has Adopted Requirements Consistent With the Guidance" and "Analysis of Steps Taken By New York State in Response to EPA's 90-Day Letter."

#### A. Today's Final Action

On April 11, 2000, EPA issued a letter notifying the New York State Department of Environmental Conservation (NYSDEC) that, while the State of New York had generally adopted requirements consistent with the Guidance, EPA concluded that portions of the standards, policies and procedures adopted by the State were not consistent with corresponding provisions of the Guidance. On April 28, 2000, EPA published in the **Federal Register** a notice of and solicitation of public comment on its April 11, 2000 letter. 65 FR 24957. EPA has completed its review of all public comments on the April 11, 2000, letter and has determined that, with two exceptions described below, New York State has adopted requirements consistent with all aspects of the Guidance. Specifically, New York State has adopted requirements consistent with, and EPA is therefore approving those elements of the State's submissions which correspond to: The definitions in 40 CFR 132.2; the water quality criteria for the protection of aquatic life, human health and wildlife in tables 1-4 of part 132, with two exceptions as described below; the methodologies for development of aquatic life criteria and values, bioaccumulation factors, human health criteria and values and wildlife criteria in appendices B-D; the antidegradation policy in Appendix E; and the implementation procedures in appendix F. As explained more fully below, New York State has not adopted requirements consistent with (1) the chronic numeric aquatic life criteria in Table 2 of part 132 for Class D waters in the Great Lakes Basin, and (2) the wildlife criterion for mercury in Table 4 of part 132.

EPA's April 11, 2000, letter concluded that some of the provisions that EPA is now approving authorized the State to act consistent with the Guidance, but

provided inadequate assurance that the State would exercise its discretion consistent with the Guidance. To provide this assurance, EPA and NYSDEC have worked together to develop an amendment to the National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement (MOA) between EPA Region II and NYSDEC. By this amendment NYSDEC has committed to always exercise its discretion under the MOA provisions in a manner consistent with the Guidance. Pursuant to 40 CFR 123.44(c)(3) and 123.63(a)(4), the State is required to comply with commitments made in its MOA or risk EPA objection to permits and even program withdrawal. This MOA has demonstrated to EPA that the State will implement the approved provisions consistent with the Guidance. The specific provisions that EPA is approving, and EPA's full rationale for approving these provisions, are set forth in the documents entitled "New York State Provisions Approved as Being Consistent With the Guidance," "Analysis of Whether New York State Has Adopted Requirements Consistent With the Guidance" and "Analysis of Steps Taken By New York State in Response to EPA's 90-Day Letter" included in the record for this action.

EPA has determined that the failure of New York State to apply the chronic aquatic life criteria in section 703.5 of Title 6 of the New York State Codes, Rules and Regulations (NYCRR) to waters in the Great Lakes Basin classified as "Class D" surface waters under 6NYCRR 701.9 is inconsistent with 40 CFR 132.3(b) and 132.4(d)(2). These provisions of the Guidance require States to adopt and apply both acute and chronic numeric aquatic life criteria to all waters in the Great Lakes System. In the past, NYSDEC's classification system for the 3,312 waterbody segments contained in the New York State portion of the Great Lakes System has been based on the use of a single aquatic life-based criterion for all classified waters in the State: (1) Classes A-C, waters designated for fish propagation, were assigned chronic criteria only; and, (2) Class D, waters designated for fish survival, were assigned acute criteria only.

NYSDEC has added acute criteria to all Class A-C waters in the State. However, the State has not included chronic criteria for Class D waters. Rather, New York is in the process of completing a statewide reclassification effort which will result in the upgrade of the vast majority of segments in the Great Lakes System to classifications which include both acute and chronic

aquatic life criteria. For the remaining Class D waters, use attainability analyses (UAAs) will be completed, consistent with the site-specific modification procedure described in the Guidance, to justify a decision to impose no chronic criteria at a site where it is shown that there is no reason to apply such criteria—that no organisms "occur at the site" for time periods long enough to suffer chronic effects.

While the State is currently in the process of completing its reclassification effort, there are 940 waterbody segments in the New York State portion of the Great Lakes System which have not yet been addressed through the State's process and currently lack chronic water quality criteria to protect aquatic life. Consequently, EPA finds that New York State's failure to apply chronic aquatic life criteria to these waters is not consistent with 40 CFR 132.3(b) and 132.4(d)(2). EPA, therefore, disapproves 6NYCRR 703.5 and 701.9 insofar as these provisions fail to apply chronic water quality criteria for the protection of aquatic life to "Class D" waters and has determined that 40 CFR 132.4(d)(2) shall apply to waters which are currently classified as "Class D" in the Great Lakes System in the State of New York.

40 CFR 132.4(d) states: "The water quality criteria and values adopted or developed pursuant to [the Guidance criteria methodologies] shall apply as follows: \* \* \* (2) The chronic water quality criteria and values for the protection of aquatic life or site-specific modifications thereof shall apply to all waters of the Great Lakes System." By making this section applicable to "Class D" waters in the Great Lakes System in New York, today's rule has the effect of making the chronic aquatic life criteria or values adopted or developed by New York contained in 6NYCRR 703.5, or site-specific modifications of the criteria, applicable to such waters. As explained in the record for today's action, EPA has concluded that the chronic aquatic life criteria adopted by New York, the State's methodologies for developing aquatic life criteria and values, and the State's procedure for site-specific modifications to such criteria, are all consistent with the Guidance. Under today's rule, those criteria, as well as any new criteria, values and site-specific criteria adopted or developed by the State pursuant to its approved methodologies and procedures, and approved by EPA, will also apply to Class D waters.

EPA understands that New York State is in the process of completing the necessary rulemaking to revise its

regulations to upgrade the vast majority of segments in the Great Lakes System to classifications which include both acute and chronic aquatic life criteria, or to perform the necessary UAAs (consistent with the State's approved site-specific criteria methodology) to show that chronic aquatic life criteria for certain Class D waters are not needed. EPA will work closely with NYSDEC to insure that its revised regulations will be consistent with the Guidance. NYSDEC will then submit its UAAs and revised regulations to EPA for review pursuant to section 303(c) of the Clean Water Act as a revision to its water quality standards regulations. Because today's rule only applies to Class D waters in the Great Lakes System in the State, a water segment that is upgraded to a higher classification (to which the State's chronic criteria apply under the State's standards) will remove the water segment from the coverage of today's rule. Also, under today's rule, if the State submits, and EPA approves, an analysis that demonstrates, consistent with the State's procedure for site-specific modifications to criteria, that application of the chronic criteria is not needed, such a site-specific modification to the criteria will apply to that water segment.

EPA has also determined that New York State's mercury criterion for the protection of wildlife in the waters of the Great Lakes System at 6NYCRR 703.5 is inconsistent with 40 CFR 132.3(d), and Table 4 of 40 CFR part 132. States are required to adopt criteria for the protection of wildlife which are as protective as the numeric criteria included in Table 4 of 40 CFR part 132. NYSDEC has adopted a wildlife criterion for mercury, which is expressed as the dissolved form of the metal. This criterion has been calculated based upon the use of an alternative percent of methyl mercury using New York State-specific data. The State's wildlife criterion is 2.6 ng/L (dissolved); EPA's criterion is 1.3 ng/L (total recoverable). New York State used EPA's conversion factor of 0.85 in its derivation of the dissolved-based wildlife criterion. Based on the application of EPA's conversion factor of 0.85, New York State's dissolved-based wildlife criterion for mercury equates to 3.06 ng/L total recoverable for wildlife (compared to the Guidance wildlife criterion of 1.3 ng/L). Based upon the comparison of State's wildlife criterion to the wildlife criterion in the Guidance on a total recoverable basis, EPA has determined that the New York State wildlife criterion for mercury is

not as protective as the wildlife criterion in the Guidance.

Based upon the above, EPA finds that New York State has failed to adopt a wildlife criterion for mercury that is consistent with Table 4 of part 132, as required by 40 CFR 132.3(c). EPA, therefore, disapproves the State's wildlife criterion for mercury in the waters of the Great Lakes System at 6NYCRR 703.5, and has determined that the wildlife criterion for mercury contained in Table 4 to 40 CFR part 132 shall apply to the waters of the Great Lakes System in the State of New York. As discussed above, NYSDEC has adopted human health and aquatic life criteria for mercury that are as protective as the mercury criteria in Tables 2 and 3 of part 132. EPA notes that under certain conditions New York State's human health criterion as implemented may be as protective of wildlife as the mercury wildlife criterion in the Guidance in Table 4, however, this is not always the case.

EPA understands that New York State is in the process of completing the necessary rulemaking to adopt the Guidance wildlife criterion of 1.3 ng/L (total recoverable) for mercury, which will be applicable to the waters of the Great Lakes System in the State of New York. EPA will work closely with NYSDEC to insure that this criterion will be consistent with the Guidance. NYSDEC will then submit its criterion to EPA for review pursuant to section 303(c) of the Clean Water Act, and, if EPA approves those revisions, EPA will revise its regulations so that the mercury wildlife criterion in Table 4 of 40 CFR part 132 will no longer apply to the waters within the Great Lakes System in the State of New York.

#### A. Public Comments

EPA received two comments in response to its **Federal Register** document of its receipt of the substantial NPDES program modification component of the State's Guidance submission. These commenters stated general support for approval of the State's submission. EPA received one comment on the **Federal Register** notice of the availability of EPA's April 11, 2000 letter to the State of New York. EPA has responded to that commenter in a document entitled "Response to Comments Received on EPA's April 11, 2000 Letter to the New York State Department of Environmental Conservation (NYSDEC) on New York State's Great Lakes Initiative Submission" that has been included as part of the record in this matter. The following is a summary of

EPA's responses to the significant points of these comments.

*Comment:* The commenter asserted that EPA's regulatory determinations are being made without affected parties having any chance to review the Agency's reasoning or to raise issues as to the validity of that reasoning, in violation of the Administrative Procedure Act and EPA's public participation regulations at 40 CFR part 25.

*Response:* The final rule being promulgated today makes certain provisions of 40 CFR part 132 applicable to discharges in New York State within the Great Lakes System. Those provisions were adopted after publication of a proposed rule for public comment. See 58 FR 20802 (April 16, 1993). EPA is not modifying those provisions, but merely making them effective in accordance with 40 CFR 132.5(f)(2). Therefore, the public had a full opportunity to comment on the contents of today's rule. Moreover, public comment was also received regarding EPA's review of the New York State submission. EPA provided public notice of the availability of, and solicited comment on, the NPDES portions of the New York State Guidance submission in a **Federal Register** document (63 FR 19490) dated April 20, 1998. In a **Federal Register** document (65 FR 24957) dated April 28, 2000, EPA subsequently provided notice of the availability of a letter to the State of New York in which EPA provided (a) detailed explanations of the bases for its findings that the State had not adopted provisions consistent with certain provisions of the Great Lakes Guidance and (b) its preliminary conclusions that, with the exception of those findings, the State had adopted provisions consistent with the Guidance. EPA also solicited comment on all aspects of this letter, and has considered and responded to all comments received before taking today's final action. Consequently, EPA has complied with all applicable public participation requirements.

*Comment:* The commenter has indicated that both EPA and New York State must commit to holding public comment periods on the draft of the addendum to the NPDES Memorandum of Agreement (MOA) that the agencies intend to enter into for the purpose of implementing certain Great Lakes Initiative (GLI) requirements in New York.

*Response:* Under 40 CFR 123.62(b)(2) and 132.5(e), whenever EPA determines that a proposed revision to a State NPDES program is substantial, EPA must provide notice and allow public comment on the proposed revisions. On

April 20, 1998, EPA published notice in the **Federal Register** (63 FR 19490) "Notice of Proposed Revisions to the Approved Program to Administer the National Pollutant Discharge Elimination System Permitting Program in New York Resulting In Part From Adoption of the Water Quality Guidance for the Great Lakes System." In that document EPA sought public comment concerning whether EPA should approve the GLI-related revisions to New York's NPDES program because, as stated in the document, EPA believes that it is appropriate to consider the NPDES component of New York's submission to be a substantial program modification. The only comments received in response to the notice were two recommendations in support of the EPA approving these revisions.

On April 28, 2000, the public was provided with a second opportunity to comment on EPA's review of the GLI-related provisions of New York's NPDES program when EPA published a **Federal Register** document (65 FR 24957) soliciting public comment on its April 11, 2000, letter (i.e., 90-day letter) to NYSDEC commenting on New York's GLI submission. The 90-day letter provided a detailed explanation of EPA's views regarding New York's revisions to its NPDES program. The commenter seems to imply that, not only is EPA required to solicit public comment on the substantial program modification submitted by New York, but that EPA must also solicit public comment because the revisions to the NPDES MOA itself constitutes a substantial program modification. EPA disagrees. The revisions to the MOA do not substantially modify New York's NPDES program for they do not enact any new authorities, or substantially modify the State's program submitted by the State to EPA in February 1998 and made available for public comment at that time. Rather, the revisions to the MOA simply clarify the manner in which New York intends to implement its existing authorities to address the concerns raised in EPA's 90-day letter, which itself was also subject to notice and comment. The revisions to the MOA ensure that New York will administer its existing NPDES program consistent with the requirements of the Guidance and simply set forth how New York's existing authorities for administering the NPDES program will be implemented in the context of the Guidance. Therefore, the MOA is not itself a substantial program modification requiring public comment.

*Comment:* The commenter states that EPA's analysis regarding many of these provisions focuses on whether New

York's GLI rules are written in a substantially similar way as the Federal GLI guidance. However, the proper focus on whether New York's GLI rules are consistent with (as protective as) the Federal GLI rules should be on environmental results. As such, EPA's evaluation should be based on whether the State rules achieve or exceed the level of protection provided in the Federal guidance, and should not involve a strict accounting of whether the language of the Federal GLI rules was incorporated into the State rules.

*Response:* EPA agrees with the commenter's characterization of the nature of EPA's evaluation. The Guidance gives States the flexibility to adopt requirements that are not the same as the Guidance provided that the State's provisions afford at least as stringent a level of environmental protection as that provided by the corresponding provision of the Guidance. In making these evaluations, EPA is also mindful that a major goal of the Guidance and section 118(c) of the CWA was to achieve more consistency in the level of protection across the entire Great Lakes Basin. To achieve this goal requires not only a comparable level of protection as defined by the water quality standards, but also implementation procedures that are as protective as each corresponding procedure in the Guidance. EPA has carefully reviewed New York State's water quality standards, antidegradation policies and implementation procedures for consistency with the Guidance, taking into account this flexibility, and has not required the State to incorporate the Guidance as written, provided the State's procedures can be expected to achieve the same level of protection as the Guidance. With two exceptions, EPA has found New York State's submission to be consistent with 40 CFR part 132. EPA's review was not based upon a verbatim comparison of New York's submission with the Guidance. In most instances EPA has concluded that New York State's water quality standards, antidegradation policies and implementation procedures are as protective as the Guidance's requirements. In addition, where appropriate EPA and New York State have agreed to facilitate the approval process by entering into an Amendment to their Memorandum of Agreement regarding the State's approved NPDES program by which New York commits to exercise its discretion consistent with the Guidance.

*Comment:* The commenter states that in explaining its disapproval of New York's wildlife water quality criterion for mercury, EPA stated that 40 CFR

132.4(d) requires that States adopt aquatic life, human health, and wildlife criteria, and that each type of criteria must be as protective as the corresponding Federal criteria. The commenter states that he believes that EPA's interpretation of this provision of the Federal GLI rule is incorrect. 40 CFR 132.4(d) requires States to apply criteria adopted pursuant to the methodologies or site-specific modification procedures for aquatic life, human health, and wildlife, to all waters of the Great Lakes System. The commenter argues that New York State has complied with this requirement, as its wildlife criterion for mercury does apply to all State waters within the Great Lakes System. The commenter further states that this provision does not require States to adopt all types of criteria, of which each type must be at least as stringent as the criteria in Tables 1 through 4 of 40 CFR part 132.

The commenter also states that because New York's human health criterion for mercury is more protective than EPA's wildlife criterion for mercury, EPA should not require New York to adopt EPA's wildlife criterion for mercury.

*Response:* EPA disagrees with the commenter's position regarding the requirements in the Guidance, which address State adoption of aquatic life, human health, and wildlife criteria. While, as the commenter states, 40 CFR 132.4(d) requires States to apply criteria adopted pursuant to the methodologies or site-specific modification procedures for aquatic life, human health, and wildlife, to all waters of the Great Lakes System, 40 CFR 132.5(g)(1) requires that for pollutants in Tables 1, 2, 3 and 4 of this part, States must adopt numeric criteria which are as protective as "each" of the numeric criteria in Tables 1, 2, 3 and 4 of this part taking into account any site-specific modifications in accordance with Procedure 1 of Appendix F of the Guidance. New York State's wildlife criterion for mercury of 2.6 ng/L (dissolved) is less stringent than the criterion of 1.3 ng/L (total recoverable) found in Table 4 of the Guidance. Using EPA's conversion factor of 0.85 to convert New York State's dissolved-based wildlife criterion for mercury to a total recoverable criterion results in total recoverable-based wildlife criterion for mercury of 3.06 ng/L compared to the Guidance wildlife criterion of 1.3 ng/L. Based upon the above comparison of the State's wildlife criterion to the wildlife criterion in the Guidance on a total recoverable basis, EPA has determined that the New York State wildlife criterion for mercury is not as protective

as the wildlife criterion in Table 4 of the Guidance. Therefore, EPA found that New York State's wildlife criterion for mercury was not consistent with the requirements of 40 CFR 132.5(g)(1). As such, EPA disapproves of New York State's wildlife criterion for mercury at 6NYCRR 703.5, and has determined that the wildlife criterion for mercury contained in Table 4 to 40 CFR part 132 shall apply for discharges into the Great Lakes System in the State of New York.

EPA disagrees that the State's adoption of a human health criterion for mercury obviates the requirement for the State to adopt a wildlife criterion as protective as the Guidance. While, under some circumstances, the State's human health criterion for mercury may result in controls on permitted discharges that are as stringent as would be developed using EPA's wildlife criterion, EPA has concluded that this would not necessarily be true in all cases, depending on site-specific conditions, in particular the amount of total suspended solids in the receiving water. Moreover, to approve the State's mercury human health criteria as consistent with EPA's wildlife criterion, EPA would have to assume that the State would always implement its human health criteria in such a way as to ensure protection of wildlife as well. Because exposure scenarios for human health and wildlife differ, however, States have flexibility to adopt differing approaches in implementing these two types of criteria. See, e.g., 40 CFR part 132, appendix F, procedure 3.E.1 (describing different stream design assumptions for different kinds of criteria). Moreover, while New York's human health criteria currently apply to all waters, the State has flexibility under the Guidance to apply less stringent criteria to specific waters where justified by local rates of fish-consumption and bioaccumulation factors (see 40 CFR part 132, appendix F, procedure 1.A.4.b.). EPA believes that applying the Federal mercury wildlife criterion to waters in the Great Lakes System will ensure the protection of wildlife without inappropriately limiting the State's discretion as to how it implements its human health criteria or burdening EPA with overseeing the State's application of its human health criteria to ensure that wildlife will be protected as well.

*Comment:* In the case of several State implementation procedures for which EPA had identified concerns in the April 11, 2000 letter, the commenter stated that EPA should approve these State implementation procedures as being as protective as the Federal procedures.

*Response:* The State of New York has entered into an amendment to the MOA with EPA regarding the State's National Pollutant Discharge Elimination System program. This MOA addresses each of EPA's concerns regarding the State's implementation procedures. Therefore, EPA is approving the State's implementation procedures.

EPA has responded to the specific comments on each of the individual State implementation procedures in a document entitled "Response to Comments Received on EPA's April 11, 2000 Letter to the New York State Department of Environmental Conservation (NYSDEC) on New York State's Great Lakes Initiative Submission" that has been included as part of the record in this matter.

#### B. Consequences of Today's Action

As a result of today's action, the Guidance provisions specified in today's rule apply in the Great Lakes System in New York State until such time as the State adopts requirements consistent with the specific Guidance provisions at issue, and EPA approves those State requirements and revises the rule so that the provisions no longer apply in New York State.

#### II. "Good Cause" Under the Administrative Procedure Act

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA finds it unnecessary and contrary to the public interest. Today's rule does not promulgate any new regulatory provisions. Rather, in accordance with the procedures in 40 CFR 132.5(f), today's rule identifies the provisions of part 132 promulgated previously by EPA that shall apply to discharges in New York State within the Great Lakes System. Those provisions have already been subject to a notice of proposed rulemaking, and publication of a new proposed rule is therefore unnecessary. See 58 FR 20802 (April 16, 1993). In addition, while EPA's approval/disapproval decisions described in this notice do not constitute rulemaking, EPA has nonetheless received substantial public comment on these decisions. See 63 FR 19490 (April 20, 1998) (notice of receipt of State

Guidance submission and request for comment); 65 FR 24957 (April 28, 2000) (notice of letter identifying inconsistencies and request for comment). EPA also believes the public interest is best served by fulfilling the CWA's requirements without further delay and publication of a notice of proposed rulemaking therefore would be contrary to the public interest. Thus, notice and public procedure are unnecessary. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

#### III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, as described in section II, above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). In addition, because this action does not promulgate any new requirements, but only makes certain existing provisions of 40 CFR part 132 effective in New York State, it does not impose any new costs. The costs of part 132 were considered by EPA when it promulgated that regulation. Therefore, today's rule does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA, or significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the State, on the relationship between the national government and the State, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629,

February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by Section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a major rule as defined by 5 U.S.C. 804(2). This rule will be effective November 6, 2000.

#### List of Subjects in 40 CFR Part 132

Environmental protection, Administrative practice and procedure, Great Lakes, Indian-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: September 29, 2000.

**Carol M. Browner,**  
Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 132 as follows:

#### PART 132—WATER QUALITY GUIDANCE FOR THE GREAT LAKES SYSTEM

1. The authority citation for part 132 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

2. Section 132.6 is amended by adding paragraphs (d) and (e) to read as follows:

#### § 132.6 Application of part 132 requirements in Great Lakes States and Tribes.

\* \* \* \* \*

(d) Effective November 6, 2000, § 132.4(d)(2) shall apply to waters designated as "Class D" under section 701.9 of Title 6 of the New York State Codes, Rules and Regulations within the

Great Lakes System in the State of New York. For purposes of this paragraph, chronic water quality criteria and values for the protection of aquatic life adopted or developed pursuant to § 132.4(a) through (c) are the criteria and values adopted or developed by New York State Department of Environmental Conservation (see section 703.5 of Title 6 of the New York State Codes, Rules and Regulations) and approved by EPA under section 303(c) of the Clean Water Act.

(e) Effective November 6, 2000, the criteria for mercury contained in Table 4 of this Part shall apply to waters within the Great Lakes System in the State of New York.

[FR Doc. 00-25747 Filed 10-5-00; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 403

[FRL-6882-9]

#### Community XL (XLC) Site-Specific Rulemaking for Steele County, MN

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) will implement a project under the Project XLC program for certain facilities in Steele County, Minnesota. The terms of the project are defined in a Final Project Agreement (FPA) which was made available for public review and comment through a **Federal Register** notice on December 29, 1999 (64 FR 73047) and signed on May 31, 2000. In addition, EPA is promulgating a site-specific rule, applicable only to the Steele County Sponsors who are Participating Industrial Users, to facilitate implementation of the project. This site-specific rule provides regulatory changes under the Clean Water Act (CWA or the Act) to implement the Community XL project, which will result in superior environmental performance. The site-specific rule changes some of the requirements which apply to the Sponsors who are Participating Industrial Users to promote a reduction in the discharge of four priority metals, a reduction in water usage, and the development of an Environmental Management System. An incentive-based monitoring approach will be implemented, such that as discharge reduction goals are met, monitoring frequency may be reduced, mass-based limits will replace certain

concentration limits, and an alternative Significant Noncompliance (SNC) publication approach will be tested. Monitoring reductions for pollutants determined not to be present in an industry's wastestream will also be authorized.

**DATES:** This final rule is effective October 6, 2000. For judicial review purposes, this rule is promulgated as of 1 p.m. (Eastern Daylight Time) on October 6, 2000.

**ADDRESSES:** A docket containing the rule, Final Project Agreement, and supporting materials is available for public inspection and copying at U.S. EPA, Region V, Water Division, Room Number 15046, 77 West Jackson Boulevard, Chicago, IL 60604-3507. The Office is open from 9 a.m. to 4 p.m. Monday through Friday, excluding federal holidays. The public is encouraged to phone in advance to review docket materials. Appointments can be scheduled by phoning Abeer Hashem at (312) 886-1331. Refer to the Docket for the Steele County Site-Specific Rulemaking. The public may copy a maximum of 100 pages at no charge. Additional copies cost 15 cents per page. Project materials are also available on the World Wide Web at: <http://www.epa.gov/projectxl/>.

Supporting materials are also available for inspection and copying at U.S. EPA, Headquarters, 401 M Street, SW., Room 445, West Tower, Washington, DC 20460 during normal business hours. Persons wishing to view the materials at the Washington, DC location are encouraged to contact Ms. Kristina Heinemann in advance by telephoning (202) 260-5355. In addition supporting materials are available at the Owatonna, MN Public Library, 105 Elm Avenue, North, Owatonna, MN 55060. The phone number for the library is 507-444-2460, TDD 507-444-2480.

**FOR FURTHER INFORMATION CONTACT:** Ms. Abeer Hashem or Mr. Matthew Gluckman, U.S. Environmental Protection Agency, Region V, Water Division, WC-15] or WN-16], 77 West Jackson Boulevard, Chicago, IL 60604-3507. Ms. Hashem can be reached at (312) 886-1331 and Mr. Gluckman can be reached at (312) 886-6089. Further information on today's action may also be obtained on the world wide web at: <http://www.epa.gov/projectxl/>.

**SUPPLEMENTARY INFORMATION:** On May 8, 2000, the Environmental Protection Agency proposed a site-specific rule (65 FR 26550) that set forth the mechanism through which the Sponsors will attempt to reach discharge reduction goals for chromium, copper, nickel, and zinc; reach water use reduction goals;

and commit to arrange and participate in training for the development of an Environmental Management System (EMS), as outlined in the Steele County Project XLC FPA (the document that embodies the parties' intent to implement this project). Today's final rule promulgates regulations that are identical to the proposed rule and that include the final group of Participating Industrial Users among those named in the May 8, 2000 proposal. Today's rule will facilitate implementation of the FPA that has been developed by the Steele County Project Sponsors, EPA, the Steele County Community Advisory Committee (CAC), the Minnesota Pollution Control Agency (MPCA), the Owatonna Waste Water Treatment Facility (OWWTF), the Blooming Prairie Waste Water Treatment Facility (BPWWTF), and other stakeholders. The FPA is available in the docket for today's action and on the world wide web at <http://www.epa.gov/projectxl/>. The FPA addresses the nine Project XLC criteria, and the expectation of EPA that this XLC project will meet those criteria. Those criteria are: (1) Environmental results superior to what would be achieved through compliance with current and reasonably anticipated future regulations; (2) economic opportunity; (3) stakeholder involvement, support and capacity for community participation; (4) test of innovative, multi-media, pollution prevention strategies for achieving environmental results; (5) approaches that could be evaluated for future broader application (transferability); (6) technical and administrative feasibility; (7) mechanisms for monitoring, reporting, and evaluation; (8) consistency with Executive Order 12898 on Environmental Justice (avoidance of shifting of risk burden); and (9) community planning. The FPA specifically addresses the manner in which the project is expected to produce superior environmental benefits.

Today's rule will implement the provisions of this Project XLC initiative that require regulatory changes. However, Minnesota has had an approved State National Pollutant Discharge Elimination System (NPDES) program since June 30, 1974, and an approved State pretreatment program since July 16, 1979. Therefore, the requirements outlined in today's rule will not take effect until Minnesota revises the Owatonna pretreatment program as incorporated in the Owatonna NPDES permit. EPA will not be the primary regulatory agency responsible for implementing the